Petition

81-1976

No._____

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In the Supreme Court of the United States

October Term, 1981

GREGORY E. WALTERS

Petitioner,

Tennessee Valley Authority
R. O. Swisher
James Cox
Michael Butler

Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals

For the Sixth Circuit

DAVID A. BURKHALTER, II
Counsel of Record
5401 Kingston Pike, #500
P. O. Box 11841
Knoxville, TN 37919
(615) 584-0241

April 22, 1982

QUESTIONS PRESENTED

1. Whether the distinction between the qualified immunity given to federal officials who commit constitutional violations and the absolute immunity given federal officials who commit state common-law torts is constitutionally valid?

2. Whether the Tennessee Valley Authority and individual Defendants are precluded from claiming absolute immunity when they violate a regulation prohibiting the release of information related to personnel files?

3. Whether the Tennessee Valley Authority and individual Defendants are statutorily entitled to claim absolute immunity against suits for defamation and infliction of emotional distress?

LIST OF ALL PARTIES

Parties Petitioner:

Gregory E. Walters

Parties Respondent:

Tennessee Valley Authority
R. O. Swisher
James Cox
Michael Butler

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REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF LOWER COURT OPINIONS

The Memorandum Opinion (Docket No. 3-80-367)[1] of the United States District Court for the Eastern District of Tennessee, Northern Division, the Honorable Robert L. Taylor, presiding, granting Defendants' Motion For Summary Judgment and dismissing Plaintiff's claim was filed November 11, 1980, and is reported in 503 F. Supp. 111 (E.D. Tenn. 1980).

On appeal to the United States Court of Appeals for the Sixth Circuit, the judgment of the District Court was affirmed

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[1]The opinion of the District Court covered two cases: Gregory E. Walters v. Tennessee Valley Authority, Docket No. 3-80-332, in which release of certain information was sought under the Freedom Of Information Act, and Gregory E. Walters v. Tennessee Valley Authority, et al, Docket No. 3-80-367, a suit for damages based on libelous statements made about petitioner. Both cases were dismissed but only the libel claim, 3-80-367, was pursued in the Court of Appeals.

upon the opinion of the District Court by an order (Docket No. 80-5430) entered on January 28, 1982, which is unreported.

STATEMENT OF GROUNDS ON WHICH JURISDICTION INVOKED

The Court of Appeals for the Sixth Circuit, after hearing the case of Walters v. Tennessee Valley Authority, et al, Docket No. 80-5430, upon the record, briefs and oral argument of the parties, entered an order affirming the judgment of the District Court granting summary judgment in favor of Defendants upon the opinion of the District Court. The order was entered on the 28th day of January, 1982.

Petitioner's claim has been denied by a final decision of a Circuit Court of Appeals and the right of appeal to the Court is unavailable in this case. Therefore, Petitioner seeks further review of this case by respectfully requesting that the Court grant this Petition for Certiorari, which is made pursuant to 28 U.S.C. § 1254 (1) and within the time allowed by 28 U.S.C. § 2101(c).

Constitutional Provisions, Statutes And Regulations which the case involves

United States Constitution:

Fifth Amendment

Fourteenth Amendment, Section I

Statutes:

16 U.S.C. § 813c

28 U.S.C. § 1254(1)

28 U.S.C. § 2101(c)

28 U.S.C. § 2680

Regulations:

18 C.F.R. § 1301.1(a)

(The above provisions are set out in detail in the Appendix of this Petition.)

STATEMENT OF THE CASE

Nature of the Case

The Petition for Writ of Certiorari of Gregory E. Walters, Plaintiff-Petitioner, arises from the dismissal of his action against Defendants by the U.S. Court for the Eastern District of Tennessee, Northern Division and affirmance of the District Court by the Court of Appeals for the Sixth Circuit. Petitioner filed a complaint against Defendants, R. O. Swisher, James Cox and Michael Butler and the Tennessee Valley Authority alleging that the individual Defendants had slandered and defamed him and that their actions constituted extreme and outrageous conduct of a type not to be tolerated in a civilized society. Plaintiff-Petitioner also alleged that the actions of the individual Defendants were imputable to the Defendant, Tennessee Valley Authority. Plaintiff-Petitioner sought One Million Dollars ($1,000,000.00)

in compensatory and punitive damages.

Course of Proceedings and Disposition of Case in Lower Courts

Gregory E. Walters, the Plaintiff-Petitioner came before the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1291 to appeal the order of the United States Court for the Eastern District of Tennessee, granting Defendants' Motion For Summary Judgment. The Court of Appeals affirmed the judgment of the District Court on January 28, 1982.

Petitioner filed this suit in the Circuit Court for Knox County, Tennessee on July 19, 1980 against Defendants, R.O. Swisher, James Cox, Michael Butler and the Tennessee Valley Authority on grounds of

slander, defamation and outrageous conduct. (App. p. 3-9).[2]

Defendants removed this case to the United States Court for the Eastern District of Tennessee, Northern Division, pursuant to 28 U.S.C. § 1441 and § 1442(a) on August, 19, 1980. (App. p. 10-23).

Defendants moved for Summary Judgment on the grounds that the Defendants were absolutely immune from tort liability on October 24, 1980 (App. p. 29-30). On November 11, 1980 by Order and Memorandum Opinion, the District Court, Honorable Robert L. Taylor, presiding, granted Defendants' Motion for Summary Judgment and dismissed Petitioner's case. (App. p. 184-195). An appeal to the Court of

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[2]References are to pages of joint appendix filed by Petitioner and Defendants in No. 80-5430 in the United States Court of Appeals for the Sixth Circuit.

Appeals was timely taken on November 19, 1980. (App. p. 196). Petitioner's Motion to File a Deferred Appendix was granted on December 15, 1980. (App. p. 197).

STATEMENT OF FACTS

Gregory E. Walters, the Plaintiff-Petitioner, was employed by the Tennessee Valley Authority from June 20, 1977 until May 12, 1980 as an Energy Advisor in the Home Insulation Program. (App. p. 106). Petitioner's duties included conducting house energy surveys and doing follow-up reinspections in the City of Oak Ridge, Tennessee. (App. p. 106). During the course of his employment as an Energy Advisor, Petitioner discovered that the Home Insulation Program contained many flaws in the areas of faulty work, employee deficiencies and fire hazards. (App. p. 126-160). Petitioner also learned that this faulty work and fire hazards were being approved for payment by T.V.A. employees in violation of the requirements of the T.V.A. Home Insulation Handbook. (App. p. 148-157).

Petitioner alerted T.V.A. officials of these problems in the Home Insulation Program in November, 1979. (App. p. 108, 130-132). After Petitioner alerted T.V.A. officials about the problems in the Home Insulation Program, Mr. Walters supervisors undertook a course of extreme harassment of the Petitioner. (App. p. 133-144). In response to this harassment, Mr. Walters filed a grievance against his immediate supervisor in December of 1979. (App. p. 121). While the grievance was pending, this supervisor prepared a T.V.A. Performance Evaluation of Mr. Walters which gave Petitioner a low performance rating. (App. p. 117-121). Prior to this evaluation, Petitioner had received adequate evaluation for his job performance. (App. p. 111-116). After Petitioner learned that T.V.A. had not complied with their own procedures concerning the submission of the poor services review, Mr. Walters submitted his

own evaluation which became the official evaluation under T.V.A. regulations. (App. p. 107, 122-125).

In response to Petitioner's complaints, T.V.A. conducted an investigation and the report issued as a result of that investigation stated, in part:

> It appears that in some cases Mr. Walters' allegations of T.V.A. approvals of improper insulation work are correct; in other cases we were unable to establish whether his original charges were accurate since further insulation work had been done; and in some cases it appears that Mr. Walters' complaints are hypertechnical or incorrect.

(App. p. 45).

At the conclusion of the investigation, the report was not released to the public because of "privacy considerations." (App. p. 50). On April 30, 1980, at the conclusion of the investigation, Petitioner was given a Notice of Probationary Assignment. (App. p. 161-162). This Notice of

Probationary Assignment was rejected by Mr. Walters because it contained untrue statements and Mr. Walters was denied a chance to read the report of the investigation (App. p. 109). An additional Notice of Probationary Assignment was received on May 6, 1980 and rejected for the same reasons as the first Notice. (App. p. 109). Petitioner resigned from T.V.A. on May 12, 1980 (App. p. 109).

On May 1, 1980, a summary of the investigation of the Home Insulation Program by T.V.A. was released to the Oak Ridger newspaper which accused Petitioner of having a past history of job deficiencies. (App. p. 7-9). This summary of the investigation was prepared by Defendant, R.O. Swisher. (App. p. 65-66). This summary was released to the Oak Ridger newspaper by Michael Butler (App. p. 68-69). This summary of T.V.A.'s investigation including

the statement defaming Petitioner was published in the Oak Ridger newspaper on May 2, 1980 (App. p. 9).

ARGUMENT

I. THE DISTINCTION BETWEEN THE QUALIFIED IMMUNITY GIVEN TO FEDERAL OFFICIALS WHO COMMIT CONSTITUTIONAL VIOLATIONS AND THE ABSOLUTE IMMUNITY GIVEN FEDERAL OFFICIALS WHO COMMIT STATE COMMON-LAW TORTS IS CONSTITUTIONALLY INVALID.

First, Petitioner would respectfully submit that the distinction drawn by the Courts between the commission by federal officials of state common-law torts and constitutional torts as it relates to the ability of an aggrieved party to recover for such wrongs is unconstitutional. The doctrine of absolute immunity for government officials accused of committing common-law torts and the doctrine of qualified immunity applied to officials accused of committing constitutional violations results in the creation of two separate classes of injured parties from a group of similarly situated persons. The unequal treatment gives the class whose constitutional rights

have been violated the right to recover if it can be shown that a government official acted unreasonably and denies recovery to the class who allege that the government official committed a common-law tort.

Although the Fifth Amendment contains no equal protection clause, "it does forbid discrimination that is 'so unjustified as to be violative of due process. '" Shapiro v. Thompson, 394 U.S. 618, 642 (1969). "if a classification would be invalid under the Equal Protection Clause of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment." Johnson v. Robison, 415 U.S. 361, 364 n.4 (1973). Since the judicial action of state courts is limited by the Equal Protection Clause of the Fourteenth Amendment, the Fifth Amendment Due Process Clause would limit Federal Courts from acting in a way inconsistent with the Fourteenth Amendment's

Equal Protection Clause. Cf. 415 U.S. at 364 n.4.

To justify a classification under the Equal Protection Clause of the Fourteenth Amendment, it "must be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Reed v. Reed, 404 U.S. 71, 76 (1971). In this case, a distinction between a qualified immunity for officials accused of committing constitutional violations and an absolute immunity for officials accused of committing common-law torts, does not meet these equal protection requirements.

Even those who would retain a doctrine of absolute immunity in either situation have characterized the distinction as illogical. For example, Justice Rehnquist stated that "(t)he most heinous common-law tort surely cannot be less important to,

or have less of an impact on, the aggrieved individual than a mere technical violation of a constitutional proscription." Butz v. Economou, 438 U.S. 478, 523 (1978) (Rehnquist, J., concurring and dissenting).

The illogical nature of the distinction and the lack of necessity for an absolute immunity for federal executive officials is shown by the fact that state officials have operated under a qualified immunity standard for both common-law torts and constitutional violations with no adverse effect on the performance of their duties. Comment, Federal Executive Immunity From Civil Liability and Damages: A Re-evaluation of Barr v. Mateo, 77 Col. L. Rev. 625, 643 (1977).

Petitioner respectfully contends that the classification of parties entitled to recover from the misconduct of government officials insofar as it is based on the nature of their claim is arbitrary, un-

reasonable and based upon no ground of difference between the similarly situated class which is denied recovery. Each class is harmed by the acts of commission or ommission of government officials, and the ability of one class to recover to the exclusion of the right of the other equally injured class to recover in no way alters the effective functioning of government. Therefore, this classification would violate the Equal Protection Clause of the Fourteenth Amendment and is prohibited by the due process clause of the Fifth Amendment.

The constitutional validity of granting absolute immunity or qualified immunity based upon whether the claim is grounded on common law or on a constitutional violation was raised, briefed and argued before the Sixth Circuit but was not passed upon by the Court of Appeals. However, the Court has the power to consider an issue

even if it was not presented in the Court of Appeals nor Petition for Certiorari. Vance v. Terrazas, 444 U.S. 252, 258, 259 n. 5 (1980). A fortiori, the Court has the power to hear the important constitutional issue raised by Petitioner, as well as Petitioner's remaining two questions.

II. THE TENNESSEE VALLEY AUTHORITY AND INDIVIDUAL DEFENDANTS ARE PRECLUDED FROM CLAIMING ABSOLUTE IMMUNITY WHEN THEY VIOLATE A REGULATION PROHIBITING THE RELEASE OF INFORMATION RELATED TO PERSONNEL FILES.

Assuming that the doctrine of absolute immunity espoused in Barr v. Matteo, 360 U.S. 564 (1959), is to remain in force, Petitioner contends that Defendants' duties and their actions in this case do not justify applying the Barr rule and extending to Defendants the absolute immunity they claim. Petitioner contends that the applicability of the doctrine of absolute immunity enunciated in Barr is not so clear and

settled as would support the summary dispositions of the lower courts. The evolving nature of this area of the law is evidenced by plurality and closely split decisions emanating from the Court on the issue of immunity for government officials. Eg. Barr v. Matteo; Butz v. Economou; supra. Petitioner contends that Barr v. Matteo was not designed to reach so far as Defendants' claim and would commend to the Court the words of Justice Brandeis:

> The process of inclusion and exclusion, so often applied in developing a rule, cannot end with its first enunciation. The rule announced must be deemed tentative. For many and varying facts to which it will be applied cannot be foreseen. Modification implies growth. It is the life of the law.

State of Washington v. W.C. Dawson & Co., 264 U.S. 219, 236 (1924) (Brandeis, J., dissenting).

Petitioner contends that the instant case is the type case which the Court has

recognized would not entitle Defendants to the protection afforded a government official by Barr v. Matteo, because the release of the information was "unauthorized" and "the claim of absolute immunity ...(should) ... not have been upheld." Butz v. Economou, supra, at 489.

Petitioner does not challenge the supervisory power of the agency over its employees. However, Petitioner does challenge T.V.A.'s authority to disseminate to the public defamatory information which in no way runs to the functioning of the agency as established by Congress nor impairs or relates to the broad policy decisions of the agency. To allow the agency to shield itself from liability simply by claiming that the alleged defamatory information was sent through proper supervisory channels pursuant to established procedure would result in gross injustice. This is especially true in this case as the defamatory information about Petitioner

was initially contained in a report withheld from the press based on "privacy considerations". (App. p. 50).

More important, the release of such information is prohibited by 18 C.F.R. § 1301.1 which exempts personnel records from inspection or copying by the public, because as stated in subsection (a)(6),"... disclosure ... would constitute a clearly unwarranted invasion of personal privacy." Subsection (a)(2) exempts information "related solely to the internal personnel rules and practices of T.V.A. ..." By releasing the information to a newspaper which had requested information on the Petitioner specifically, T.V.A. violated the spirit, if not the letter, of the prohibition contained in the regulation. Therefore, the Defendants mistakenly believed they were acting within the scope of their duties when, in fact, they were violating an agency regulation. However, because

Defendants admit to the private nature of the information, it is possible that they knowingly violated the prohibition on the release of such information and in so doing were acting outside the scope of their prescribed authority. In either case, Defendants should not be allowed to claim absolute immunity under Barr v. Matteo.

Further, 18 C.F.R. 1301.1 is a T.V.A. regulation. The agency should know its own rules yet it neither informed the lower courts nor counsel for Petitioner that release of the information complained of by Petitioner is prohibited by regulation. Because the regulation is arguably adverse to T.V.A.'s position and could be dispositive of the case in Petitioner's favor, the Court should not allow T.V.A. to claim that Petitioner is barred from raising this issue in this Court for failure to raise

the issue in the lower courts.[3]

Throughout the proceedings in this case, T.V.A. and the other named Defendants freely admitted, albeit mistakenly, that the actions complained of were taken within the scope of their employment as federal officers. It does not stretch the mind to understand the reason for their position. Obviously, such self serving admissions seem to raise the umbrella of immunity over them. Federal officers, by simply stating that alleged defamatory actions were taken pursuant to duties prescribed by agency regulations could insulate themselves against suit and conceivably bar an injured party from recovering in almost every case.

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[3]Ethical Consideration 7-23 of the American Bar Association's Code of Professional Responsibility provides in part: "Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he shall inform the tribunal of its existence unless his adversary has done so ...."

Thus, by issuing job descriptions for each employee in any level of management which might encompass some discretion to make potentially defamatory statements about lower-level employees, an agency could insulate its managers at all levels and the agency itself from all future suits.

Surely, the displacement of a person's rights should not be so easy, and this Court should make it clear that such circumvention of individual rights will not be countenanced in the name of good government nor receive protection under the doctrine of absolute immunity.

III. THE TENNESSEE VALLEY AUTHORITY AND INDIVIDUAL DEFENDANTS ARE NOT STATUTORILY ENTITLED TO CLAIM ABSOLUTE IMMUNITY AGAINST SUITS FOR DEFAMATION AND INFLICTION OF EMOTIONAL DISTRESS.

Finally, it is questionable whether Congress intended T.V.A. to have the broad

immunity it claims.[4] When T.V.A. was established, Congress made the corporation subject to suit. 16 U.S.C. § 831 c(b). T.V.A. apparently does not enjoy special immunity against actions for defamation or infliction of emotional distress under the Tennessee Valley Authority Act of 1933 nor its amendments. The limitations placed on suits of this nature brought under the Federal Tort Claims Act, are not applicable to suits against T.V.A. because T.V.A. has been totally excluded by 28 U.S.C. § 2680 (l).

A pertinent part of § 2680, subject to an exception not applicable here, precludes the bringing of suit under the Tort

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[4]This issue was raised in the Original Complaint filed in state court, (App. p.2), and in Petitioner's Brief In Opposition To Motion For Summary Judgment in District Court, (App. p. 104), but was not passed upon because there were no conclusions beyond the finding that the doctrine of absolute immunity barred the suit.

Claims Act for "any claim arising out of assault, battery, false imprisionment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights ...." 28 U.S.C. § 2680(h) (emphasis added). When Congress provided that certain claims against the government could be brought under the Federal Tort Claims Act, it exempted suits based on libel and slander. Likewise, in 28 U.S.C. § 2680(a), Congress barred any claim "... based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of government, whether or not the discretion involved be abused."

By explicity excluding the activities of T.V.A. from the protection and limitations to suit contained in 28 U.S.C. § 2680, and by allowing T.V.A. to be sued through 16 U.S.C. § 831 c(b), Congress intended

that T.V.A. could be sued without limitation for libel and slander, whether or not committed in the performance of a perceived discretionary function. To bar Petitioner's claim by granting T.V.A. absolute immunity would be contrary to the intent of Congress.

CONCLUSION

In light of the importance of the constitutional issue raised and the serious implications of allowing T.V.A. absolute immunity when an agency regulation may have been violated,and in the face of congressional intent to deny the agency absolute immunity in a case of this nature, it is respectfully requested that the Court issue a Writ of Certiorari to review the Judgment of the Court of Appeals for the Sixth Circuit.

DAVID A. BURKHALTER, II
Counsel of Record
5401 Kingston Pike
P.O. Box 11841
Knoxville, TN 37919-1841
(615)584-0241

April 22, 1982

Appendix

APPENDIX

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS WHICH THE CASE INVOLVES

United States Constitution:

Fifth Amendment

Fourteenth Amendment, Section I

Statutes:

16 U.S.C. § 813c

28 U.S.C. § 1254(1)

28 U.S.C. § 2101(c)

28 U.S.C. § 2680

Regulations:

18 C.F.R. § 1301.1(a)(1980)

(The above provisions are set out in detail in the Appendix of this Petition.)

United States Constitution:

AMENDMENT 5

Criminal actions - Provisions concerning - Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be public use, without just compensation.

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes:

16 U.S.C. § 831c. Corporate powers generally; eminent domain; construction of dams, transmission lines, etc.

Except as otherwise specifically provided in this Act, the Corporation:

(a) Shall have succession in its corporate name.

(b) May sue and be sued in its corporate name.

(c) May adopt and use a corporate seal, which shall be judically noticed.

(c) May make contracts, as herein authorized.

(e) May adopt, amend, and repeal bylaws.

(f) May purchase or lease and hold such real and personal property as it deems necessary or convenient in the transaction of its business, and may dispose of any such personal property held by it.

The board shall select a treasurer and as many assistant treasurers as it deems proper: Provided, That any member of said board may be removed from office at any time by a concurrent resolution of the Senate and the House of Representatives.

(g) Shall have such powers as may be necessary or appropriate for the exercise of the powers herein specifically conferred upon the Corporation.

(h) Shall have power in the name of the United States of America to exercise the right of eminent domain, and in the purchase of any real estate or the acquisition of real estate by condemnation proceedings, the title to such real estate shall be taken in the name of the United States of America, and thereupon all such real estate shall be entrusted to the Corporation as the agent of the United States to accomplish the purposes of this Act.

(i) Shall have power to acquire real estate for the construction of dams, reservoirs, transmission lines, power houses, and other structures, and navigation projects at any point along the Tennessee River, or any of its tributaries, and in the event that the owner or owners of such property shall fail and refuse to sell to the Corporation at a price deemed fair and reasonable by the board, then the Corporation may proceed to exercise the right of eminent domain, and to condemn all property that it deems necessary for carrying out the purpose of this Act, and all such condemnation proceedings shall be had pursuant to the provisions and requirements hereinafter specified, with reference to any and all condemnation proceedings: Provided, That nothing contained herein or elsewhere in this Act shall be

construed to deprive the Corporation of the rights conferred by the Act of February 26, 1931 (46 Stat. 1422, ch. 307, secs. 1 to 5, inclusive), as now compiled in section(s) 258e, inclusive, of Title 40 of the United States Code.

(j) Shall have power to construct such dams, and reservoirs, in the Tennessee River and its tributaries, as in conjunction with Wilson Dam, and Norris, Wheeler, and Pickwick Landing Dams, now under construction, will provide a nine-foot channel in the said river and maintain a water supply for the same, from Knoxville to its mouth, and will best serve to promote navigation on the Tennessee River and its tributaries and control destructive flood waters in the Tennessee and Mississippi River drainage basins; and shall have power to acquire or construct power houses, power structures, transmission lines, navigation projects, and incidental works in the Tennessee River and its tributaries, and to unite the various power installations into one or more systems by transmission lines.

(k) Shall have power in the name of the United States:

(a) to convey by deed, lease, or otherwise, any real property in the possession of or under the control of the Corporation to any person or persons, for the purpose of recreation or use as a summer

residence, or for the operation on such premises of pleasure resorts for boating, fishing, bathing, or any similar purpose;

(b) to convey by deed, lease, or otherwise, the possession and control of any such real property to any corporation, partnership, person, or persons for the purpose of erecting thereon docks and buildings for shipping purposes or the manufacture or storage thereon of products for the purpose of trading or shipping in transportation: Provided, That no transfer authorized herein in (b) shall be made without the approval of Congress: And provided further, That said corporation, without further action of Congress, shall have power to convey by deed, lease, or otherwise, to the Ingalls Shipbuilding Corporation, a tract or tracts of land at or near Decatur, Alabama, and to the Commercial Barge Lines, Inc., a tract or tracts of land at or near Guntersville, Alabama;

(c) to transfer any part of the possession and control of the real estate now in possession of and under the control of said Corporation to any other department, agency, or instrumentality of the United States: Provided, however, That no land shall be conveyed, leased, or

transferred, upon which there is located any permanent dam, hydroelectric power plant, or munitions plant heretofore or hereafter built by or for the United States or for the Authority, except that this prohibition shall not apply to the transfer of Nitrate Plant Numbered 1, at Muscle Shoals, Alabama, or to Waco Quarry: And provided further, That no transfer authorized herein in (a) or (c), except leases for terms of less than twenty years, shall be made without the approval of the President of the United States, if the property to be conveyed exceeds $500 in value; and

(d) to convey by warranty deed, or otherwise, lands, easements, and rights-of-way to States, counties, municipalities, school districts, railroad companies, telephone, telegraph, water, and power companies, where any such conveyance is necessary in order to replace any such lands, easements, or rights-of-way to be flooded or destroyed as the result of the construction of any dam or reservoir now under construction by the Corporation, or subsequently authorized by Congress, and easements and rights-of-way upon which are located transmission or distribution lines. The Corporation shall also have power to convey or lease Nitrate Plant Numbered 1, at Muscle Shoals, Alabama, and Waco Quarry,

with the approval of the War Department (Department of the Army) and the President.

(l) Shall have power to advise and cooperate in the readjustment of the population displaced by the construction of dams, the acquisition of reservoir areas, the protection of watersheds, the acquisition of rights-of-way, and other necessary acquisitions of land, in order to effectuate the purposes of this Act; and may cooperate with Federal, State, and local agencies to that end.

28 U.S.C. § 1254. Courts of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal

shall be restricted to the Federal questions presented:

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 2101. Supreme Court; time for appeal or certiorari; docketing; stay.

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment,

order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court.

The stay may be granted by a judge of the court rendering the judgment or decree or by justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

28 U.S.C. § 2680. Exceptions.

The provisions of this chapter and section 1346(b) of this title shall not apply to:

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) (Repealed)

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That with

regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for co-operatives.

Regulations:

18 C.F.R. § 1301.1(a)(1980). Records.

(a) Records available. TVA's records will be made available for inspection and copying upon request as provided in this section, except that records are exempt and are not made available if they are (1)(i) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (ii) are in fact properly classified pursuant to such Executive order; (2) related solely to the internal personnel rules and practices of TVA; (3) specifically exempted from disclosure by statute; (4) trade secrets and commercial or financial information obtained from any person and privileged or confidential; (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with TVA, including without limitation records relating to control and accounting for special nuclear material and to the physical security plans for the protection of TVA's nuclear facilities; (6) personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records complied for law enforcement purposes, but only to the extent that the production of such records would (i) interfere with enforcement proceedings, (ii) deprive a person of a right to a fair trial or an impartial adjudication, (iii) constitute an unwarranted invasion of personal privacy, (iv) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (v) disclose investigative techniques and procedures, or (vi) endanger the life or physical safety of law enforcement personnel; (8) contained in or related to examination, operation, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institution; or (9) geological and geophysical information and data, including maps, concerning wells. The availability of certain classes of nonexempt records is deferred for such time as TVA may determine is reasonably necessary to avoid interference with the accomplishment of its statutory responsibilities. Such records include bids and information concerning the identity and number of bids received prior to bid opening; all nonexempt records relating to bids between the time

of bid opening and award; and all nonexempt records relating to negotiations in progress involving contracts or agreements for the acquisition or disposal of real or personal property by TVA prior to the conclusion of such negotiations. Any reasonably segregable portion of an available record shall be provided to any person requesting such record after deletion of the portions which are exempt under this paragraph.

CERTIFICATE OF SERVICE

I, David A. Burkhalter, II, hereby certify that I have served three (3) true and exact copies of this Petition For Writ of Certiorari upon Herbert S. Sanger, Jr., Justin M. Schwamm, Sr., Robert C. Glinski, and William B. Casto, Attorneys for Respondents, and one (1) copy to The Honorable Wade H. McCree, Solicitor General by mailing same, this the 22nd day of April, 1982.

DAVID A. BURKHALTER, II
Counsel of Record for
Petitioner

Appendix

81-1976

No. _____

Office - Supreme Court, U.S.
FILED
MAY 8 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1981

GREGORY E. WALTERS

Petitioner,

Tennessee Valley Authority
R. O. Swisher
James Cox
Michael Butler

Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals

For the Sixth Circuit

DAVID A. BURKHALTER, II
Counsel of Record
5401 Kingston Pike, #500
P. O. Box 11841
Knoxville, TN 37919
(615) 584-0241

April 27, 1982

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MEMORANDUM AND ORDERS OF THE
UNITED STATES DISTRICT COURT
(Filed November 11, 1980)

No. C 3-80-332
and
No. C 3-80-367

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

GREGORY E. WALTERS
Plaintiff

v.

TENNESSEE VALLEY AUTHORITY
Defendant

TAYLOR, District Judge

These actions arise out of the same facts, and so will be considered together. In Civ. 3-80-332, plaintiff seeks release of a report prepared by the Tennessee Valley Authority (TVA) Office of the General

Counsel in response to certain allegations he made with regard to TVA's Home Insulation Program. Civ. 3-80-367 is an action for damages in which plaintiff claims he was libeled by statements made by three employees of TVA and published in the Oak Ridger newspaper. Though the facts may be stated together, the cases present distinct legal issues which will be considered separately.

Facts

TVA sponsers a Home Insulation Program under which an eligible homeowner can receive a free "energy audit" to determine his or her home insulation and weatherization needs. The homeowner can also receive interest-free financing from TVA for qualified energy improvements, and a further inspection to insure that insulation and other work has been properly installed prior to undertaking liability for payment. (Aff. of James Cox, filed in Civ. 3-80-367, at p.2).

From June, 1977, until his resignation in May, 1980, plaintiff was employed by TVA as an Energy Adviser whose duties included conducting the inspections required by the Home Insulation Program in the Oak Ridge community.

In November, 1979, plaintiff made the first of several complaints to TVA management officials concerning alleged deficiencies in the Home Insulation Program. He claimed that work performed under the program was faulty and in some cases even presented fire hazards to the homes concerned. He also charged that other inspectors were approving the work despite the deficiencies.

Plaintiff claims that as a result of his complaints in late 1979 and early 1980, he was subjected to vindictive harassment by his supervisor H.C. Anderson (not a party to either lawsuit), and in January, 1980, received a poor service review. Plaintiff

strongly contests Anderson's eligibility to review his work performance because he had filed a grievance against Anderson shortly before which was pending at the time.

On March 3, 1980, a rather lengthy article appeared in the Oak Ridger, an Oak Ridge newspaper, describing plaintiff's charges. (Ex. 3 to Aff. of Michael L. Butler, filed in Civ. 3-80-367). The article was apparently based on an interview with plaintiff, and reported that TVA's Office of General Counsel was investigating the matter. The article states that James Cox, Manager of the Eastern District Office of Power, and a defendant in Civ. 3-80-367, commented only that the situation involved a "sensitive personnel matter" which TVA was "looking into." (Id.)

After publication of the March 3 article, the Oak Ridger repeatedly contacted

TVA for follow-up information. On April 24, it was reported that the General Counsel's Office had completed its investigation and was forwarding its report to management. The paper was told that the report "might not be released to the public because of privacy consideration." (Aff. of Michael L. Butler, filed in Civ. 3-80-367, at p.2).

Subsequent to publication of the April 24 article, TVA decided not to release the investigation report. In response to repeated inquiries from the Oak Ridger, Michael L. Butler, TVA's Manager of Media Relations, directed R.O. Swisher, Coordinator of the District Offices of TVA's Office of Power, to prepare a summary of the report's conclusion and of the action taken by TVA with respect to plaintiff. The statement is attached as Exhibit 5 to Butler's affidavit. On or about May 1, Butler called the Oak Ridger reporter who

had written the two previous stories and read the statement to her. He says in his affidavit that he made no further comment on the matter, and that the printed statement was never itself released. Although the statement nowhere mentions plaintiff by name, the article reporting the statement, published May 2, 1980, does. (Exhibit B to original complaint.) The statement prepared by Swisher contains the following sentences, which form the basis for his libel action:

> This adviser has been given a probationary assignment in the Appalachian District Office in Knoxville where he will continue working with the Home Insulation Program in another capacity. His assignment in Knoxville will be probationary because of a history of job performance deficiencies.

Thereupon, plaintiff sought a copy of the investigation report prepared by the Office of the General Counsel. While he was allowed to read the report on May 2,

TVA repeatedly refused to provide him with a copy. (See exhibits to complaint in Civ. 3-80-332). Having exhausted his remedies within TVA, plaintiff filed suit in this Court seeking the report under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. While TVA refused to produce the report in connection with the FOIA action claiming it was privileged and confidential and thus exempt under § 552(b)(5),(6), and (7), it did finally provide plaintiff with a copy both in response to a request for production of documents and as an exhibit to its motion for summary judgment in connection with the libel action. However, the names of all homeowners who were interviewed were deleted from the copies provided.

Civ. 3-80-332 FOIA Claim

Defendant TVA has moved for summary judgment in the FOIA case contending that the issues are moot because it supplied

the requested report in connection with the libel case. Plaintiff admits that Exhibit 5 attached to the affidavit of James Cox and filed in Civ. 3-80-367 is in fact the sought-after report, but argues that he has not received the entire report because of the deleted names, and that he is entitled to attorney's fees under § 552(a)(4)(E).

As to the first contention, the Court notes that in a letter dated June 6, 1980 to William Willis, General Manager of TVA, announcing his intent to appeal defendant's denial of his FOIA request and the reasons therefor, plaintiff stated:

> The names and addresses of the private citizens would not be a disclosure that would be a clearly unwarranted invasion of personal privacy because I furnished the Office of the General Counsel with the names of the homeowners, et cetera. I had been to each of these homes which prompted the request for the investigation. However, legally you may block out the names and addresses when you

> furnish me with a copy of the report.
>
> (Exhibit D to complaint in Civ. 3-80-332).

While we are not able to say that, as a matter of law, this amounts to a waiver by plaintiff of his request for the names, it does indicate that he already has access to the information. Plaintiff's request for full disclosure of the names is therefore denied.

Plaintiff also seeks attorney's fees under 5 U.S.C. § 552(a)(4)(E), which provides:

> The Court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

We note that the award of fees is not automatic, but is within the sound discretion of the trial court. Polynesian Cultural Center, Inc. v. NLRB, 600 F.2d 1327 (9th Cir. 1979); Chamberlain v. Kurtz, 589 F.2d

827 (5th Cir. 1979). In deciding whether to award fees in an FOIA case, the Court must weigh the following factors: public benefit of disclosure; commercial benefit to the complainant; the nature of the complainant's interest in the records sought; and the reasonableness of the asserted basis for withholding. Nationwide Bldg. Maintenance, Inc. v. Sampson, 559 F.2d 704, 712 (D.C. Cir. 1977).

Plaintiff has made no showing of what he intends to use the copy of the report for, except to indicate that he needed it "in order that I could carefully consider the statements contained therein." (Affidavit of Gregory Walters, Ex. A to plaintiff's motion for summary judgment in Civ. 3-80-332). Two and one-half months after his initial request for the document, plaintiff filed a libel action against TVA. In addition we cannot say that TVA's initial refusal to publish the report was unreason-

able in view of its character as a memorandum from attorney (General Counsel's Office) to client (TVA management) concerning serious charges about a TVA program. On balance, we do not feel this is a proper case for an award of attorney fees.

Accordingly, it is ORDERED that defendant's motion for summary judgment be, and the same hereby is, granted, and that Civ. 3-80-332 be, and the same hereby is, dismissed as moot.

Libel Claim, Civ. 3-80-367

Defendants have moved for summary judgment in the libel case as well. They argue that the alleged libelous statements were made by the individual defendants, if at all, within their discretionary authority as management personnel of TVA, a government agency, and that they therefore enjoy absolute immunity from civil liability

of the kind claimed here under the doctrine announced in Barr v. Matteo, 360 U.S. 564 (1959). TVA then argues that it cannot be held liable on a respondeat superior theory where those from whom its liability is derived are immune.

Plaintiff does not allege that the TVA itself libeled him or caused him harm directly. TVA's liability depends upon the liability of the individual defendants. Stewart v. Craig, 208 Tenn. 212, 344 S.W. 2d 761 (1961). The controlling issue in this case, then, is whether the individual defendants are immune from suit.

Barr v. Matteo, supra, was itself a libel action. The Acting Director of the Office of Rent Stabilization was sued by two former employees for statements he made when he determined to suspend them for their involvement in a rather questionable accumulated annual leave payment plan some two and one-half years before. The

Supreme Court dismissed the suit holding that the defendant was absolutely immune from the libel action, despite allegations of malice in the complaint. 360 U.S. at 574. In his plurality opinion, Justice Harlan relied on an expansion of Spalding v. Vilas, 161 U.S. 483 (1896), which had clothed a Cabinet officer with the same immunity.

> It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted--the relation of the act complained of to "matters committed by law to his control or supervision," Spalding v. Vilas, supra, at 498--which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits. . . . The fact that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable. . . .
>
> 360 U.S. at 574, 575.

Thus, under Barr v. Matteo, supra, a government official is immune from civil liability for defamation arising out of

statements made or action taken by him which is within the outer perimeter of his line of duty. Each of the individual defendants has submitted an affidavit and job description. Plaintiff has offered no evidence to rebut the defendants' proof.

Defendant James Cox was, at the time the statement was issued, the District Manager of the Eastern District Office of TVA's Office of Power. As such, Mr. Cox had responsibility "for administering and coordinating all activities in the district that affect the power program, such as public understanding, implementation of all energy conservation programs, and relationships of distributors and the general public." (Ex. 1 to affidavit of James Cox). He also supervised personnel employed in the District Manager's Office in which plaintiff was employed. (See Employee Profile, Employee Service Review Form, attached to affidavit of Gregory Walters and filed in Civ. 3-80-

367). Although the allegations against Mr. Cox are not clear, as it is not claimed that he had personal involvement with issuing the statement in question, it does appear from the record that it was he who informed plaintiff of his probationary assignment in Knoxville. This he had clear authority to do and he is immune from liability arising out of that action.

Michael Butler was Manager of Media Relations at the time he read the statement to the Oak Ridger reporter. As such, he is responsible for maintaining "daily contact with the news media in the Tennessee Valley and beyond and serves as key public spokesperson for the agency on matters related to TVA." (Ex. 2 to affidavit of Michael L. Butler, filed in Civ. 3-80-367). Clearly, Butler had authority to make the statement which he made to the press.

Defendant R.O. Swisher was Coordinator

of the District Offices of TVA's Office of Power. He serves as "coordinator in the preparation of responses to inquiries from the public and correspondence referred from the TVA Board and General Manager through the Power Manager's Office." (Ex. 1 to affidavit of R.O. Swisher, filed in Civ. 3-80-367). Once again, preparation of the statement read to the press by Butler was a matter squarely within his job description.

Since all acts performed and statements made which form the basis of this lawsuit were done by officials of TVA and were "within the outer perimeter of their lines of duty," each of the individual defendants is absolutely immune from tort liability arising therefrom. Barr v. Matteo, supra. Estate of Burks v. Ross, 438 F.2d 230 (6th Cir. 1977), is not to the contrary. In that case, the court held that the "executive privilege" announced in Barr did not extend to employees of a veterans hospital who

"had few discretionary duties, but performed largely ministerial functions under the supervision and orders of their superiors." 438 F.2d at 235. Here, all the individual defendants are of managerial level (see job descriptions cited above) and are clothed with considerable discretion in the performance of their duties.

Finally, we hold that since the individual defendants cannot be held liable to plaintiff, and since that is the sole basis of TVA's liability, the plaintiff's claim against the latter must fail as well. Stewart v. Craig, supra, 344 S.W. 2d at 763.

Accordingly, it is ORDERED that defendants' motion for summary judgment be, and the same hereby is, granted. It is further ORDERED that Civ. 3-80-367 be, and the same is, dismissed.

Order Accordingly.

/s/ ROBERT TAYLOR
United States District Judge

ORDER OF THE UNITED STATES

DISTRICT COURT

(Filed November 11, 1980)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TENNESSEE

NORTHERN DIVISION

No. C 3-80-332

GREGORY E. WALTERS

Plaintiff

v.

TENNESSEE VALLEY AUTHORITY

Defendant

TAYLOR, District Judge

For the reasons stated in a memorandum opinion this day passed to the Clerk for filing, it is ORDERED that Plaintiff's motion for summary judgment be, and the same hereby is, denied. It is further ORDERED that defendant's motion for summary judgment be, and the same hereby is, granted

and that the case be dismissed as moot.

Enter:

/s/ ROBERT TAYLOR
United States District Judge

ORDER OF THE UNITED STATES

DISTRICT COURT

(Filed November 11, 1980)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TENNESSEE

NORTHERN DIVISION

No. C 3-80-367

GREGORY E. WALTERS

Plaintiff

v.

TENNESSEE VALLEY AUTHORITY

Defendant

TAYLOR, District Judge

For the reasons stated in a memorandum opinion this day passed to the Clerk for filing, it is ORDERED that defendants' motion for summary judgment be, and the same hereby is, granted and that the case be dismissed.

Enter:

/s/ ROBERT TAYLOR
United States District Judge

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed January 28, 1982)

No. 80-5430

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GREGORY E. WALTERS

Plaintiff-Appellant,

v.

TENNESSEE VALLEY AUTHORITY,

Defendant-Appellee.

BEFORE: ENGEL AND KENNEDY, Circuit Judges and HILLMAN, District Court Judge*

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

It is ORDERED that the judgment of the district court be, and it hereby is, affirmed upon the opinion of the district

court.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN, Clerk

---

*Hon. Douglas W. Hillman, United States District Court Judge from the Western District of Michigan at Grand Rapids, sitting by designation.

ISSUED AS MANDATE: February 22, 1982
COST: NONE

CERTIFICATE OF SERVICE

I, David A. Burkhalter, II, hereby certify that I have served three (3) true and exact copies of this Supplemental Appendix to the Petition For Writ of Certiorari upon Herbert S. Sanger, Jr., Justin M. Schwamm, Sr., Robert C. Glinski, and William B. Casto, Attorneys for Respondents, and one (1) copy to The Honorable Wade H. McCree, Solicitor General by mailing same, this the 27th day of April, 1982.

DAVID A. BURKHALTER, II
Counsel of Record for
Petitioner

Opposition

Office - Supreme Court, U.S.
FILED
JUN 10 1982
ALEXANDER L. STEVAS,

No. 81-1976

In the Supreme Court of the United States

OCTOBER TERM, 1981

GREGORY E. WALTERS, PETITIONER

v.

TENNESSEE VALLEY AUTHORITY, MICHAEL L. BUTLER, R.O. SWISHER, AND JAMES COX

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

HERBERT S. SANGER, JR.
General Counsel
Tennessee Valley Authority
Knoxville Tennessee 37902
(615) 632-2241

JUSTIN M. SCHWAMM, SR.
Assistant General Counsel

ROBERT C. GLINSKI
Attorney

Tennessee Valley Authority
Knoxville, Tennessee 37902

QUESTIONS PRESENTED

1. Whether the courts below correctly held that petitioner's common law claims were barred by absolute immunity under *Barr* v. *Matteo*, 360 U.S. 564 (1959).

2. Whether the courts below correctly applied the settled state law that respondent Tennessee Valley Authority (TVA) could not be held liable under principles of respondeat superior if its employees were not liable.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1976

GREGORY E. WALTERS, PETITIONER

v.

TENNESSEE VALLEY AUTHORITY, MICHAEL L. BUTLER, R.O. SWISHER, AND JAMES COX

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. Supp. App. A21-A22) is not reported. The opinion of the district court (Pet. Supp. App. A1-A17) is reported at 503 F. Supp. 111.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1982. The petition for a writ of certiorari was filed on April 23, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Before he resigned in May 1980, petitioner was employed as an energy advisor in TVA's home insulation program (Pet. Supp. App. A3).[1] On January 15, 1980, he received a TVA performance evaluation that showed deficiencies in his performance during the prior year. Petitioner thereafter made public allegations about misconduct and faulty work in the home insulation program (*id.* at A3-A4).

On March 3, 1980, an article based on an interview with petitioner appeared in the *Oak Ridger* (Tennessee) newspaper. C.A. App. 59-61.[2] The article discussed petitioner, his charges against fellow employees, and an investigation of the charges being conducted by TVA's General Counsel. After the article appeared, reporters from the *Oak Ridger* began making weekly calls to TVA to inquire about the status of the investigation (Pet. Supp. App. A4-A5).

The investigation report, which was completed on April 4, 1980, verified some of petitioner's charges, found some to be hypertechnical or incorrect, and concluded that the remainder could not be established because additional work had been done in the homes inspected (C.A. App. 45). In light of petitioner's work record and his disagreement with his supervisors over the way in which the TVA program should be conducted, the report suggested that petitioner be transferred temporarily to a different work location "to allow [the] situation to cool off" (C.A. App. 46). The work difficulties continued and on April 30, 1980,

---

[1]TVA is a wholly owned federal corporation (16 U.S.C. 831-831dd), declared by this Court to be "an instrumentality of the United States" (*Tennessee Electric Power Co.* v. *TVA*, 306 U.S. 118, 134 (1939)).

[2]"C.A. App." refers to the joint appendix filed in the court of appeals.

respondent James Cox, the official responsible for petitioner's general supervision, notified petitioner of his probationary transfer to another district for a six-month period (C.A. App. 43-44).

In response to continuing inquiries from an *Oak Ridger* reporter about petitioner's situation, a statement was prepared by respondent R.O. Swisher, and read by telephone to an *Oak Ridger* reporter by respondent Michael L. Butler, who was then TVA's Manager of Media Relations (Pet. Supp. App. A5; C.A. App. 51).[3] The statement was never disseminated as a general press release, and did not mention petitioner by name (Pet. Supp. App. A6). The *Oak Ridger* subsequently published an article incorporating the statement, in which it inserted petitioner's name (C.A. App. 9; see Pet. Supp. App. A6).

2. This action was originally filed in state court and was removed to the United States District Court for the Eastern District of Tennessee pursuant to 28 U.S.C. 1441 and 1442(a)(1). Petitioner alleged he was defamed by the *Oak Ridger's* mention of his "probationary assignment" and his "history of job performance deficiencies." He also alleged that action taken by his supervisor in response to petitioner's poor work record constituted harrassment (C.A. App. 4). The district court, applying the rule of *Barr* v. *Matteo*, 360 U.S. 564 (1959), held that the individual defendants were immune from liability for the state common law torts with which they were charged arising out of actions taken within their lines of duty (Pet. Supp. App. A13-A17). The court also held that, since petitioner had not alleged TVA had harmed him directly, TVA could not be liable under the

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[3]Butler requested Swisher to prepare the statement since it was Swisher's official responsibility to coordinate the preparation of responses to inquiries from the public about TVA's power activities (C.A. App. 65, 70-71).

principle of respondeat superior as interpreted by the Tennessee Supreme Court (*id.* at A12). The court of appeals affirmed (*id.* at A21-A22).

ARGUMENT

The district court fully considered and correctly decided the issues before it. The court of appeals' order affirming the district court decision does not conflict with any decision of this Court or any other court of appeals. Accordingly, the case does not warrant further review.

1. a. Petitioner's common law claims for damages against federal officials for actions taken within their lines of duty are precluded by this Court's decisions in *Barr* v. *Matteo*, 360 U.S. 564 (1959), and *Howard* v. *Lyons*, 360 U.S. 593 (1959). When, as here, officials perform their professional responsibilities within the outer perimeter of the authority with which they are invested, they are protected by an absolute privilege against suits such as this one. And, as the district court properly concluded, after discussing in some detail the job descriptions and responsibilities of the individual respondents (Pet. Supp. App. A14-A17), they were "all * * * of managerial level * * * and are clothed with considerable discretion in the performance of their duties (*id.* at A17).[4]

b. Petitioner's contention (Pet. 13-18) that the application of *Barr* v. *Matteo* denied him equal protection was not made in the district court and was raised for the first time in the court of appeals.[5] Indeed, in his brief opposing defendants' motion in the district court (C.A. App. 101), petitioner

[4]Copies of the official job descriptions of respondents Butler, Swisher and Cox, setting forth their duties, were submitted to the district court (see C.A. App. 31-38, 49-58, 65-71). At the time of the events at issue, Butler was TVA's Manager of Media Relations, Swisher was Coordinator of the District Offices of TVA's Office of Power, and Cox was District Manager of the Eastern District Office.

[5]Similarly, all other issues mentioned in the petition were either not raised or abandoned in the lower courts.

"concede[d]" that the doctrine of absolute immunity for common law torts enunciated in *Barr* v. *Matteo* "is still a valid doctrine."

In any event, petitioner's claim is without merit. The distinction between the privileges available in cases involving common law and constitutional torts was explained by this Court in *Butz* v. *Economou*, 438 U.S. 478 (1978). In holding that federal officials have only a qualified rather than absolute privilege against suits alleging constitutional torts, the Court in *Economou* made clear that its decision did not erode the absolute privilege against claims of common law torts. 438 U.S. 495 & n.22; see also 438 U.S. 517-529 (Rehnquist, J., concurring and dissenting). The simple answer to petitioner's claim is that alleged victims of common law torts and constitutional torts are not similarly situated. If any further analysis is required, the reasons articulated by the Court in *Butz* v. *Economou* provide the necessary "rational basis" for the distinction drawn between alleged victims of constitutional and common law torts.[6] There is therefore no denial of equal protection.[7]

c. Petitioner's argument (Pet. 21-22) that *Barr* v. *Matteo* does not apply because respondents allegedly violated "the spirit" of the Privacy Act, 5 U.S.C. 552a, was raised neither in the district court nor in the court of appeals.

Even if this claim had been raised below, it is without merit. The undisputed record showed that Butler's statement to the *Oak Ridger* was made in response to newspaper

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[6]See, *e.g.*, *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 93-94 (1978).

[7]Moreover, the lower courts have not experienced difficulty in distinguishing between common law and constitutional torts and in applying the appropriate form of immunity. See, *e.g.*, *Granger* v. *Marek*, 583 F. 2d 781 (6th Cir. 1978); *Miller* v. *DeLaune*, 602 F. 2d 198 (9th Cir. 1979); *Birnbaum* v. *United States*, 588 F. 2d 319, 332 (2d Cir. 1978); *Sami* v. *United States*, 617 F. 2d 755, 768-771 (D.C. Cir. 1979).

inquiries that were initiated by the interview petitioner himself gave the press (C.A. App. 50-51, 59-61). The statement was prepared by respondent Swisher from his own knowledge of the investigation, and contained observations and opinions about petitioner's performance, rather than factual information maintained by TVA about petitioner in a TVA "system of records" (see 5 U.S.C. 552a(a)(5); C.A. App. 51, 65-66). As such, the statement did not come within the purview of the Privacy Act. See *Savarese* v. *HEW*, 479 F. Supp. 304, 307-309 (N.D. Ga. 1979), aff'd, 620 F. 2d 298 (5th Cir. 1980), cert. denied, 449 U.S. 1078 (1981); *FDIC* v. *Dye*, 642 F. 2d 833, 836 n.5 (5th Cir. 1981); *Jackson* v. *Veterans Administration*, 503 F. Supp. 653 (N.D. Ill. 1980); *King* v. *Califano*, 471 F. Supp. 180 (D.D.C. 1979). See also *Blevins* v. *Plummer*, 613 F. 2d 767 (9th Cir. 1980).[8]

2. a. Petitioner's final argument (Pet. 24-27) is that TVA may be held liable even if its employees are immune from suit. Although this issue was raised in the district court, petitioner abandoned it in the court of appeals. As the district court held (Pet. Supp. App. A12, A17):

> Plaintiff does not allege that the TVA itself libeled him or caused him harm directly. TVA's liability depends upon the liability of the individual defendants. *Stewart* v. *Craig*, 208 Tenn. 212, 344 S.W.2d 761 (1961).

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[8]If petitioner is claiming that his employment record contains inaccuracies, the statute provides complete and carefully drafted administrative and judicial remedies—not including defamation suits—that petitioner has not purported to exhaust. 5 U.S.C. 552a(d), 552a(g)(1) and (2). Moreover, the investigative report was not a part of petitioner's "record," and he thus had no "right" to nondisclosure. It was first made public as an exhibit to respondent Cox's affidavit in this case (C.A. App. 45-46), with identifying details about other individuals deleted. See Pet. Supp. App. A7-A9.

> [W]e hold that since the individual defendants cannot be held liable to plaintiff, and since that is the sole basis of TVA's liability, the plaintiff's claim against the latter must fail as well. *Stewart* v. *Craig, supra,* 344 S.W.2d at 763.[9]

The district court correctly applied Tennessee law to determine TVA's liability since a common law claim of respondeat superior liability, such as petitioner asserted in this case, is governed by state law. *Wheeldin* v. *Wheeler,* 373 U.S. 647, 652 (1963); *Jackson* v. *TVA,* 413 F. Supp. 1050, 1055 (M.D. Tenn. 1976), aff'd, 595 F. 2d 1120 (6th Cir. 1979).[10] And in *Stewart* v. *Craig,* 208 Tenn. 212, 344 S.W.2d 761, 763 (1961), cited by the district court, the Tennessee Supreme Court held that vicarious liability of the principal is barred when the agent is not subject to liability.[11]

b. Contrary to petitioner's assertion (Pet. 25-27), the "sue-and-be-sued" clause of the TVA Act (16 U.S.C. 831c(b), does not create or affect substantive liability. It

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[9]This principle of nonliability is well established in Tennessee law. *E.g., Ownby* v. *Kleyhammer,* 194 Tenn. 109, 250 S.W.2d 37 (1952); *Mahaffey* v. *Mahaffey,* 15 Tenn. App. 570 (1932). Accord, *Chamberlain* v. *McCleary,* 217 F. Supp. 591 (E.D. Tenn. 1963) (applying Tennessee law); and see *Lann* v. *Third National Bank,* 198 Tenn. 70, 277 S.W.2d 439 (1955); *Independent Life Insurance Co.* v. *Rodgers,* 165 Tenn. 447, 55 S.W.2d 767 (1933); *Merritt-Chapman & Scott Corp.* v. *Elgin Coal, Inc.,* 358 F. Supp. 17 (E.D. Tenn. 1972), aff'd without opinion, 477 F. 2d 598 (6th Cir. 1973). In similar circumstances, this Court has deferred to decisions of the courts of appeals and district courts applying the laws of the states within their jurisdiction. *E.g., Bishop* v. *Wood,* 426 U.S. 341, 346 & n.10 (1976); *Butner* v. *United States,* 440 U.S. 48, 58 (1979). At all events, the state law issue presented does not warrant review by this Court.

[10]As this Court has recognized, defamation is a state, rather than a federal, cause of action. *See Paul* v. *Davis,* 424 U.S. 693 (1976).

[11]In *Stewart,* the plaintiff had given the defendants' employee a covenant not to sue.

merely removes the procedural bar to suit against a government instrumentality. The legislative history of the provision indicates its procedural nature ("so that all persons who had a cause of action against the corporation might have their day in court" (H.R. Rep. No. 130, 73d Cong., 1st Sess. 16 (1933)), and this principle has been followed consistently by the courts. *E.g., Atchley* v. *TVA*, 69 F. Supp. 952 (N.D. Ala. 1947); *Grant* v. *TVA*, 49 F. Supp. 564, 565 (E.D. Tenn. 1942). In *Atchley*, the court held (69 F. Supp. at 954):

> A distinction must be recognized between the procedural question of whether a government corporation is subject to suit and the substantive question of whether a given set of facts establishes its liability as a matter of substantive law. The sue-and-be-sued clause in the TVA Act does nothing but remove the procedural bar to suit against an agency of the Federal Government. It does not engender liability in a case where liability would not otherwise exist. *Lynn* v. *United States*, 5 Cir., 1940, 110 F. 2d 586; cf. *Posey* v. *Tennessee Valley Authority*, 5 Cir., 1937, 93 F. 2d 726.

Since TVA would not otherwise be liable to petitioner,[12] his reference to the "sue-and-be-sued" clause adds nothing to his argument.

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[12]Petitioner's assertion (Pet. 26-27) that TVA is subject to suit in defamation cases by virtue of the Federal Tort Claims Act, 28 U.S.C. 2680(*l*), is specious. Petitioner contends that the Federal Tort Claims Act's bar to actions for libel and slander (28 U.S.C. 2680(h)) does not apply to TVA and therefore that such actions may proceed. This view simply misreads the statute. 28 U.S.C. 2680(*l*) exempts the United States from all suits under the Federal Tort Claims Act based on TVA's activities, thus leaving TVA's independent suability under the TVA Act, and its common law defenses and immunities, unchanged. See *Painter* v. *TVA*, 476 F. 2d 943, 945 n.5 (5th Cir. 1973); *Atchley* v. *TVA*, *supra*, 69 F. Supp. at 955 n.4; *Latch* v. *TVA*, 312 F. Supp. 1069, 1071-1072 (N.D. Miss. 1970); *Harris* v. *United States*, 154 F. Supp. 46, 50 (W.D.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

HERBERT S. SANGER, JR.
General Counsel
Tennessee Valley Authority

JUSTIN M. SCHWAMM, SR.
Assistant General Counsel

ROBERT C. GLINSKI
Attorney
Tennessee Valley Authority

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Ky. 1957); *Robinson* v. *United States*, 422 F. Supp. 121, 122 (M.D. Tenn. 1976). In any event, this action was not brought under the Federal Tort Claims Act, so petitioner's strained construction of that statute has no bearing on this case. Finally, it should be noted that petitioner has claimed punitive damages (C.A. App. 6). Such a claim does not lie against TVA (*e.g.*, *Painter* v. *TVA*, *supra*; *Grant* v. *TVA*, 44 F. Supp. 589 (E.D. Tenn. 1941), and that portion of the complaint is subject to dismissal on this ground as well.

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